90-777

Supreme Court, U.S.
FILED
OCT 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO.

in the Supreme Court of the United States

OCTOBER TERM 1990

JERRY LEE HARVEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JERRY LEE HARVEY
Petitioner Pro Se
5231 N.W. 84 Avenue
Lauderhill, Florida 33351
(305) 749-5932

QUESTION PRESENTED

Whether the Petitioner was deprived of his guaranteed award of "Complete Immunity" and all awards which were covered by this grant of immunity; which were made a part of the "Contractual Plea Bargain and Cooperation Agreement of 1980" entered into by the Petitioner and the United States Department of Justice; as well as his Constitutional Rights, when after he was given what was stated to be "Complete Immunity" and later determine to have been both "Transactional and Use Immunity" by the District Court, the 11th Circuit Court of Appeals as well as all the judges on an en banc hearing; the Government was allowed to utilize the information during both the investigation and prosecution of this case.

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT 1

OPINIONS BELOW 1

JURISDICTION 2

STATE OF THE CASE 2

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 23

INDEX TO APPENDICES

Appendix A Opinion of the Court of Appeals reported in United States v. Harvey, 900 F.2d. 1253 (8th Cir. 1989)

Appendix B Opinion of the Court of Appeals reported in United States v. Harvey, 845 F.2d 760 (8th Cir. 1988); reversal of the first conviction.

Appendix C Denial of Rehearing.

TABLE OF AUTHORITIES

CASES — PAGES

KASTIGAR v. UNITED STATES,
406 U.S. 441, 92 S.Ct. 1653,
32 L.Ed.2d. 212 (1972). . . . . *, *

Brown v. Walker,
161 U.S. 591, 16 S.Ct. 644 (1896) 15

Heike v. United States,
227 U.S. 131, 33 S.Ct. 226 (1913) 15

Ullman v. United States,
350 U.S. 422, 76 S. Ct. 497 (1956) 16

United States v. Freed,
401 U.S. 601, 91 S.Ct. 1112 (1971) 16

New Jersey v. Portash,
440 U.S. 450, 99 S.Ct. 1291,
59 L Ed. 2d 305 (1973) 17

UNITED STATES v. HARVEY,
651 Fed. Supp. 894 (S.D. Fla. 1986) 12

UNITED STATES v. HARVEY,
848 F.2d 1547 (11th Cir. 1988) 13

UNITED STATES v. HARVEY
869 F.2d 1439 (11th Cir. 1989) (en banc) 13

United States v. Minnesota Mining and Mfg. Co.,
428 F.Supp. 707 (D. Minn. 1976),
aff'd, 551 F.2d 1106 (8th Cir. 1977) 14

United States v. Librach,
536 F.2d 1228 (8th Cir. 1976) 14

UNITED STATES V. WILLIAMS
809 F.2d. 1072 (5th Cir. 1987) 14

Rowe v. Griffin,
676 F.2d 524 (11th Cir. 1982) 14

United States v. Kurzner,
534 F.2d. 511 (2nd Cir. 1976) 17

United States v. McDaniel, supra, United States v. Semkiw,
712 F.2d 891 (3rd Cir. 1983) 18

United States v. Biano,
534 F.2d 501 (1st Cir. 1976) 18

United States v. Whitney,
787 F.2d. 457 (8th Cir. 1986) 19

United States v. Brimberry,
744 F.2d. 580 (7th Cir. 1984) 19

United States v. Moeckley,
769 F.2d. 453 (8th Cir. 1985) 19

United States v. Garrett,
797 F.2d. 656 (8th Cir. 1986) 20

United States v. Hampton,
775 F.2d. 1479 (11th Cir. 1985) 20

Appeal of Starkey,
600 F.2d. 1043 (8th Cir. 1979) 20

United States v. Carpenter,
611 F.Supp. 768 (D.C. Ga. 1985) 19

United States v. Skalsky,
616 F.Supp. 676 (D.N.J. 1985) 14

United States v. Sanderson,
498 F.Supp. 273 (M.D. Fla. 1980) 14

United States v. Pellon,
475 F.Supp. 467 (S.D.N.Y. 1979) 14

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Petitioner, Jerry Lee Harvey, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Eighth Circuit allowing the United States of America to introduce evidence obtained from the defendant pursuant to an agreement for "complete immunity" without even the requiring the government to prove that the information was obtained from sources independent of the defendant.

OPINIONS BELOW

The opinion of the Court of Appeals is reported, "UNITED STATES v. HARVEY", 900 F.2d 1253 (8th Cir 1990), and appears in Appendix A to this Petition. Also attached to Appendix are: "U.S. v. HARVEY", 845 F.2d 760

(8th Cir 1988) reversal of the first conviction; and Denial of Hearing.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on April 10, 1990. A timely petition for Rehearing was filed on April 23, 1990. The Court of Appeals' denial of the Petition for Rehearing was issued on May 17, 1990 and is attached as Appendix A. This Court's jurisdiction is invoked under Title 28, U.S.C. sec. 1254(1).

STATE OF THE CASE

Defendant, Jerry Lee Harvey, was charged in the instant case with one count of conspiracy to impede and obstruct the functions of the Internal Revenue Service (18 U.S.C. 371) in connection with his purchase of an aircraft in a manner that would allow the seller of the aircraft to avoid paying some of

the required taxes on the sale. In short, the defendant (Petitioner) agreed at the request of the seller who was cooperating and working for the government, to pay part of the purchase price in cash, which was expressed as "under the table", so that the seller would not have to declare the entire selling price if he didn't want to. This charge was completely manufactured by the government and was monitored at all times by federal agents. At all times these agents continued to brief and advise their "confidential informants" the next steps necessary to be completed before the defendant Harvey could be charged for violating a federal law.

Although the sale of the aircraft in question took place in late 1982 and early 1983 and was completely monitored by government agents at all times, the filing of the charge and prosecution of the instant offense did not commence until December of 1986, only days after the Defendant secured a dismissal of unrelated income evasion charges which had been pending in the United States District Court for the Southern District of Florida. The basis for the dismissal of those charges

was the alleged violation by the government plea bargained "complete immunity" agreement which had been entered into between the Defendant and the government in 1980.

The government took an appeal of the dismissal of the charges in the Southern District of Florida. The "en banc" ruling of the Eleventh Circuit while reversing the dismissal of some of the charges, acknowledged that fact HARVEY was given an agreement for immunity.

During the initial Pretrial Detention hearing held on December 23, 1986, it became clear that the government had amassed a huge stockpile of information about the Petitioner dating back to the 1960's, much of which the Petitioner contended was presented in clear violation of the plea bargained immunity agreement between him and the government reached in 1980. In particular, the government submitted a Memo and Proffer in support of its Motion for Detention, which detailed the Petitioner's past improprieties, including one, a case from Mobile, Alabama, which was clearly subject to the plea agreement for "complete immunity".

As disclosed in the early proceedings in this case, the Petitioner had been the subject of an I.R.S. investigation in the Southern District of Florida which had resulted in the filing of a grand jury indictment in the United States District Court for the Southern District of Florida alleging various tax violations. Also, as disclosed in those proceedings shortly before the instant charge was returned in St. Louis; the Florida Court had recommended that the charges be dismissed after holding hearings and determining that in fact the Petitioner had entered into a plea bargained Immunity agreement with the government which was violated by that prosecution.

The Florida magistrate's recommendation was adopted and affirmed by the District Court a short time later and copies of the Court's decision were submitted by the Petitioner to the District Court in the instant case in support of his plea agreement immunity violation claims.

Throughout the earlier proceedings in this case, the Petitioner continued to complain of the government's utilization of this "immunitized" information. The government's response

in essence was that they disputed that the Petitioner had any such agreement, and in any event the Petitioner had not shown that it had been violated.

Prior to the beginning of jury selection on the retrial, the Petitioner specifically renewed his Motion In Limine to prevent the government from attempting to introduce evidence of "other crimes" (in particular any reference to the "drug dealing and money laundering" which was held by the Eighth Circuit Court to have been improperly admitted at the first trial) illegally committed by the Defendant in this trial. At that point the parties and the Court discussed at some length their views of the charge contained in the indictment and the various "other crimes" evidence that could be expected.

The government argued in essence that the charge was that the Defendant, through various illegal conduct, of which the instant aircraft transaction was but a small part, was engaging in an on-going attempt to "launder" his previously ill-gotten monies which the government discovered in the Cayman Islands. Which information was obtained and utilized in a

manner the Defendant has continually contended violated his "complete immunity" agreement. Accordingly, the government argued, evidence of the "laundering", the use of offshore accounts, in particular in the Cayman Islands, large amounts of currency, false information on his own tax returns (not related to the aircraft transaction), utilization of an alleged nominee corporation, the use of two social security numbers, large loans to individuals and companies, the failure to keep proper records, etc., etc., should be admitted in this trial.

The Defendant, however, contended (as he has consistently from the inception of this case) that those activities had nothing to do with the instant charge and sought to limit the testimony to the charge in the instant indictment, e.e., the alleged agreement between the Defendant, McCarten and the Vollrath officials to conceal Vollrath's tax liability on the sale of the aircraft.

In response to these arguments the Court noted that the indictment focused on the Lear Jet aircraft sale, but made no specific ruling prior to trial as to the Defendant's Motion In

Limine.

Thereupon, the matter proceeded to trial wherein the prosecutor was allowed, over the Defendant's repeated objections, to introduce evidence of these various "other crimes" or "bad acts" of the Defendant such as the placing of the money "Offshore" in the Cayman Islands, (a location the prosecutor acknowledged as being a place people read about all the time involving drug cases), the use of large amounts of currency (which the government's summary (federal agent) witness referred to as "inherently suspect"), the Defendant's presentation of allegedly false information on his personal tax return i.e., false statements about foreign bank accounts, as well as false information about his own income, the failure to produce records from the Cayman Islands, the use of two social security numbers, the making of cash deposits to his accounts, the making of loans or the use of a revolving account, the illegally improper use of a "nominee corporation" and the alleged attempt to purchase another aircraft in the same manner as in the instant case. The prosecutor was even

allowed to solicit testimony from his own witness, McCarten, that the commissions he had been paid by the Petitioner were not reported by him despite there being no allegation that the Defendant knew that they would not be or that he in any way agreed to assist McCarten to cheat on his taxes.

After successfully introducing this testimony, the prosecutor then proceeded, through the use of his "summary witness", to turn the relatively simple "aircraft transaction conspiracy" into a large scale effort by the Petitioner to launder large quantities of obviously illegal "street Bills" which are "inherently suspect" in ways other than through regular "banking channels" so that the source of the money could not be traced. As the witness noted, he was particularly well trained to audit these individuals who do not report income and are involved in "illegal activities".

The prosecutor further emphasized this information in referring to the Petitioner's "offshore cash" over the Defendant's objections and claims that it was improper and also violated his immunity agreement. The prosecutor continually

referred to the unknown "source and origin" of these "large amounts of currency" that were "inherently suspect" and showed that the Petitioner was "into some type of cash business" such that he apparently needed to "maintain an offshore bank account he doesn't mention on his tax return". The Petitioner's several Motions for Mistrial were denied, as was his request that the jury be instructed.

Finally, despite the requests of the Petitioner for an instruction to the jury on these "other crimes" and bad acts", no such instruction was ever given.

As shown by the record of the entire proceedings, the court not only erred in allowing the information to be introduced at trial, it improperly placed the burden on the Petitioner to show that there was an immunity agreement violation in the government's investigation, grand jury presentation, pretrial, and trial proceedings. Despite being advised of the nature of the Petitioner's immunity agreement, the court also allowed the prosecutor, who had been clearly "tainted" with this information in bringing the indictment, in

formulating trial strategy, in deciding on plea negotiations, and in numerous other ways throughout the proceedings.

REASONS FOR GRANTING THE WRIT

Certiori should be granted because the opinion below conflicts with the principals set down by this Court in KASTIGAR v. UNITED STATES, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d. 212 (1972).

Prior to the initiation of the prosecution of HARVEY in St. Louis in December of 1986, he had been involved in several legal proceedings, an income tax evasion matter in the United States District Court for the Southern District of Florida; HARVEY raised the issue that the prosecution was barred and tainted by the government's improper use of immunized information. Specifically, he alleged that as a result of his arrest by federal authorities in Mobile, Alabama, in May of 1980, he had entered into an agreement with the Department of Justice, wherein, in return for Petitioner's help to law enforcement in several matters, he would receive "complete

immunity" for all of his misdeeds in the past and that nothing which was disclosed and took place before 1980 would ever be used against Petitioner in any manner in any court.

The Florida District Court thereafter held several evidentiary hearings on the matter (before the Magistrate) and ultimately made specific factual findings and conclusions of law, essentially agreeing with HARVEY'S contentions. In particular the Court "found that Defendant HARVEY (Petitioner herein) had both USE and TRANSACTIONAL IMMUNITY for pre September 1980 drug dealings and financial dealings with respect to the drug dealings", see UNITED STATES v. HARVEY, 651 Fed. Supp. 894 (S.D. Fla. 1986) at page 903.

Since the government did not appeal that aspect of the decision, that ruling would have a collateral estoppel effect in the instant prosecution. This was recognized by the Eighth Circuit Court of Appeals in its opinion when it stated:

> "However, a district in Florida has found that Harvey was given both use and transactional immunity in an informal agreement with the government in 1980. United States v. Harvey, 651 F. Supp. 894 (S.D. Fla. 1986). This finding was not challenged by the government on

> appeal. A panel of the Eleventh Circuit affirmed. United States v. Harvey, 848 F.2d. 1547 (1988). Upon rehearing en banc the Eleventh Circuit reversed in part the District Court, but the finding of immunity was upheld: "Harvey received transactional and use immunity for any testimony as to which he could have invoked his fifth amendment privilege in September 1980". United States v. Harvey, 869 F.2d. 1439, 1446 (11th Cir 1989 (en banc). Accordingly, collateral estoppel applies --- the government may not relitigate the existence of this agreement in any other proceeding against Harvey."

The Defendant's position that he had in fact a binding agreement for "immunity" has been confirmed by the Eleventh Circuit in their en banc opinion. As noted therein:

> For the purposes of this appeal the government does not dispute the factual finding of the magistrate and district court that Harvey received transactional and use immunity in 1980 and that he told the DEA agents about his financial dealings, including the existence of the funds in the Cayman Islands. United States v. Harvey, 869 F.2d. 1439 (11th Cir 1989).

As recognized by the Eleventh Circuit in that opinion, while the determination that Harvey received such use and transactional immunity is clear, the effect of the ruling is somewhat less clear. There are many cases dealing with

immunity issues although most deal primarily with statutory immunity. In the instant matter, the immunities were extended by informal agreement. However, many courts have recognized such agreements and some have held that they are enforceable to the same extent as a grant of statutory immunity would have been. United States v. Minnesota Mining and Mfg. Co., 428 F.Supp. 707 (D. Minn. 1976), aff'd, 551 F.2d 1106 (8th Cir. 1977); United States v. Librach, 536 F.2d 1228 (8th Cir. 1976) (recognizing informal non-prosecution agreements); United States v. Williams, 809 F.2d 1072 (5th Cir. 1987); Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982); United States v. Skalsky, 616 F.Supp. 676 (D.N.J. 1985); United States v. Sanderson, 498 F.Supp. 273 (M.D. Fla. 1980); United States v. Pellon, 475 F.Supp. 467 (S.D.N.Y. 1979).

While the effect of a grant of use immunity is relatively easy to determine (as will be discussed infra), the effect of the grant of transactional is more difficult as the transactional immunity statute (former 18 U.S.C., section 2514) was replaced in 1970 with a use immunity statute (18 U.S.C., section 6001, et.

seq.). However, transactional immunity statutes were not uncommon and had been in effect since the 1800's. The Supreme Court has discussed the effect of such a grant of transactional immunity on several occasions. As early as 1896, the Court in discussing whether a grant of statutory transactional immunity would preclude someone from continuing to invoke his Fifth Amendment privilege remarked that "his testimony operates as a complete pardon for the offense to which it relates...he can no longer set up his privilege, since he stands, with respect to such offense as if it had never been committed". Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644 (1896). While in subsequent cases the Supreme Court has altered its view on what type of immunity (i.e. use v transactional) was required to protect an individual's Fifth Amendment privilege, few have discussed the effect of the grant of transactional immunity. While the Supreme Court recognized grants of immunity were not a "gratuity to crime" Heike v. United States, 227 U.S. 131, 33 S.Ct. 226 (1913), and do not supply "insulation for a career of crime about to be

launched" United States v. Freed, 401 U.S. 601, 91 S.Ct. 1112 (1971), they also recognized that the drafters of the Fifth Amendment to the Constitution made a judgement, "that it is better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case in whole or in part with the assistance of enforced disclosures by the accused, Ullman v. United States, 350 U.S. 422, 76 S. Ct. 497 (1956).

The extensive use by the prosecutor of the testimony obtained through the use of the immunized testimony deprived the Petitioner of a fair trial.

In addition to the transactional immunity the Petitioner also received use immunity. As set forth in the leading Supreme Court case on use immunity:

> "This total prohibition on use provides a comprehensive safeguard barring the use of compelled testimony as an "investigatory lead" and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures."

Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L. Ed.2d. 212 (1972). Subsequent cases have further held that a

defendant's immunized testimony could not even be used to impeach him in his own later criminal trial. New Jersey v. Portash, 440 U.S. 450, 99 S.Ct. 1291, 59 L Ed. 2d 305 (1973) observed that a prosecutor who retained grand jury testimony could have used it to focus the investigation to decide to initiate prosecution, to refuse to plea bargain, to interpret evidence, to plan cross-examination and otherwise generally plan trial strategy. As this Court noted, "it is difficult to speculate as to the effect that the reading of the minutes might have had on the conduct and thinking processes of the prosecutor". One court has even recognized that if the defendant's prior information contributed to a witness' decision to testify, it could violate the Kastigar proscriptures and a hearing might be necessary to inquire into the motivation of the witness to testify. United States v. Kurzner, 534 F.2d. 511 (2nd Cir. 1976).

In the instant case it is abundantly clear that the use was made of the immunized information, at virtually every stage of the proceedings. As in other cases, this in part stemmed from the difficulties which result from prosecutors being exposed to

information they do not know is immunized. United States v. McDaniel, supra, United States v. Semkiw, 712 F.2d 891 (3rd Cir. 1983) (United States Attorney's Manual provides procedure for having separate prosecutor in such proceedings). Other cases have recognized that building a "Chinese Wall" might be necessary. United States v. Biano, 534 F.2d 501 (1st Cir. 1976).

Despite the reason for the use, the prosecutor in this case was exposed to such information (he even acknowledged having discussed the matter with Florida attorneys and having received the Florida I.R.S. agent's report. He further made extensive use of the information in the pretrial proceedings, apparently utilized it in deciding to re-initiate the investigation again in 1985 and to focus HARVEY, likely used it in the Grand Jury proceedings which were conducted in this matter, but were not given to the court; based upon the predated plea agreement, he also apparently used it in determining what plea offers would be extended. His retained knowledge was also the likely source of the questioning of McCarten about HARVEY'S

drug dealing and Cayman Island bank dealings. United States v. Carpenter, 611 F.Supp. 768 (D.C. Ga. 1985). IN sum, it is clear from the record that actual use was made of HARVEY'S information which tainted the proceeding and denied him a fair trial.

As set forth earlier in the brief, HARVEY continuously objected to the use of immunized information and sought to prevent its use at both trials. He provided the court and the government with copies of the Florida Orders and sought to introduce at trial. By so doing, the Defendant put the prosecutor and the court on fair notice of the existence of his plea bargained immunity agreement and its relationship to the instant prosecution. United States v. Whitney, 787 F.2d. 457 (8th Cir. 1986); United States v. Brimberry, 744 F.2d. 580 (7th Cir. 1984), United States v. Moeckley, 769 F.2d. 453 (8th Cir. 1985).

Additionally, given the explicit nature of the Florida Court's Orders regarding immunity, HARVEY'S objections to the use of immunized information, and the motions attacking

the instant prosecution as stemming from the earlier ones, those factors combined with the prosecutor's admissions of being exposed to information previously held tainted, show that HARVEY more than met his initial required showing to cause the government to bear the heavy burden of showing that its evidence was not tainted, an almost impossible task under the circumstances of this case. Appeal of Starkey, 600 F.2d. 1043 (8th Cir. 1979); United States v. McDaniel, supra; United States v. Semkiw, supra; United States v. Garrett, 797 F.2d. 656 (8th Cir. 1986); United States v. Hampton, 775 F.2d. 1479 (11th Cir. 1985). The burden of proving "taint" was improperly placed on HARVEY.

Therefore, since Petitioner clearly has both Use and Transactional Immunity, the question to be decided is restrictions and burdens are placed upon the government when it refers to these transactions in an unrelated future case.

This Court in Kastigar was faced with the issue, whether an individual may be compelled over his objection to give testimony consistent with the Fifth Amendment privilege

against self-incrimination when he is given use immunity. The Court stated that the balancing of the two objectives i.e., the government's need to compel testimony and the defendant's right against self-incrimination required that the government be prohibited from using the compelled testimony in any respect. The Court ruled that the prohibition on use includes use of the compelled testimony as an investigatory lead and of evidence obtained by focusing investigation on the immunized witness as a result of compelled disclosures.

While the Petitioner had both Transactional and Use Immunity so that he could not be prosecuted for crimes covered by the Contractional Agreement, the question to be decided, is what use can be made of the information in an unrelated case and can the government be allowed to make repeated references to the immunized transactions without any requirement to prove that the information was independently obtained.

No hearing of any kind was held by either the Trial Court or the Magistrate requiring the government to prove that

the transactions referred to by the prosecutor were independently obtained. Once the Petitioner met his burden of proving that he had given immunized information to the government the burden should shift to the government to prove that the reference came from untainted sources.

The Trial Court must satisfy itself and must be able to find as a fact that prophylactic measures were taken to insure that the evidence to be used at trial was untainted. No such measures were taken in the instant case.

In the instant case it is abundantly clear that use was made of the immunized information, at virtually every stage of the proceedings. His tainted knowledge was the likely source of the questioning of McCarten about HARVEY'S drug dealing and Cayman Island bank dealing.

The introduction and extensive use of the testimony without the government being required to prove that the information came from untainted sources, denied the Petitioner a fair trial.

CONCLUSION

For the reasons set forth above, a writ of certiori should issue to review the judgement and opinion of the Court of Appeals in this matter.

DATED: October 3, 1990

Respectfully submitted,

Jerry Lee Harvey
Petitioner Pro Se

5231 N.W. 84 Avenue
Lauderhill, Florida 33351
(305) 749-5932

APPENDICES

WEST KEY NUMBER SYSTEM

UNITED STATES of America,

Appellant/Cross-Appellant

Nos. 89-1124, 89-1125

United States Court of Appeals,

Eighth Circuit

Submitted Oct. 12, 1989.

Decided April 10, 1990.

Following reversal of initial conviction and remand, 845 F.2d 760, defendant was convicted of conspiracy to impede collection of income taxes, after trial in the United States District Court for the Eastern District of Missouri, Edward L. Filippini, J., and he appealed. The Court of Appeals, Arnold, Circuit Judge, held that: (1) Government was entitled to evidentiary hearing to determine if enhancement under dangerous special offender sentencing statute was appropriate; (2) prior grant of transactional use immunity would not preclude evidence of pattern of conduct under the enhancement

statute provided evidence was derived from legitimate source wholly independent of the testimony given under the grant of immunity; and (3) any transactional immunity defendant received in 1980 was irrelevant to prosecution for tax conspiracy that began in 1982:

Reversed and remanded for evidentiary hearing.

1. Criminal Law ## 1208.6(5)

The Government was entitled to an evidentiary hearing to determine whether enhancement under dangerous special offender statute was appropriate, and was entitled to opportunity to show that seemingly unrelated criminal acts were in fact related; notice of intent to proceed under the statute had only to allege that a pattern of conduct existed, and did not have to actually establish proof of that matter. 18 U.S.C.(1982 Ed.) § 3575(a), (e)(2).

2. Criminal Law ## 1208.6(3)

A sufficient pattern for purposes of dangerous special offender sentencing statute would be established if the Government could show that a substantial amount of cash

involved in instant tax offense came from prior drug deals. 18 U.S.C.(1982 Ed.) § 3575.

3. Judgment 751 ##751

Though immunity grant was pursuant to informal oral agreement, once the Eleventh Circuit determined on appeal that defendant had received complete immunity, the Government was collaterally estopped from relitigating the existence of the agreement in any other proceeding against defendant.

4. Criminal Law ## 42

Transactional immunity would not preclude evidence of the offenses in question at hearing under dangerous special offender statute to determine sentence, but use immunity would prevent the Government from introducing at the sentencing hearing evidence of offenses subject to the grant of immunity unless the Government proved that the evidence was derived from a legitimate source wholly independent of the testimony given under the grant of immunity. 18 U.S.C.(1982 Ed.) § 3575.

5. Criminal Law ## 1042, 1208.6(5)

Fact that dangerous special offender sentencing statute requires that the government not disclose to the trial court, prior to conviction, that it is seeking an enhanced sentence did not require dismissal of notice of intent to seek enhancement on the ground that the same judge presided at second trial of defendant after reversal of initial conviction, and thus knew of the Government's intent before the second trial; appropriate remedy might have been motion to disqualify the trial judge from presiding at the second trial, but such objection could not be raised on appeal where it was not raised below. 18 U.S.C.(1982 Ed.) § 3575(a).

6. Criminal Law ## 1206.1(1)

Dangerous special offender sentencing statute is not unconstitutional on theory that its terms are vague. 18 U.S.C.(1982 Ed.) § 3575.

7. Criminal Law ## 42

Any transactional immunity defendant received in 1980 was irrelevant to prosecution for tax conspiracy where the

conspiracy began in 1982, nor was there a violation of use immunity by references in prosecutor's closing statements to "offshore cash" which may have been derived from immunized offenses, where the Government showed sources independent of any information defendant may have revealed in 1980.

8. Criminal Law ## 369.2(3)

In prosecution for conspiracy to impede collection of income taxes, evidence of offshore funds, minor discrepancies in other tax statements, numerous and large cash transactions, and defendant's use of nominee corporations and two social security numbers was not unduly prejudicial evidence of other bad acts, and was relevant to the crime charged. Fed.Rules Evid. Rules 403, 404, 28 U.S.C.A.

9. Criminal Law ## 700(6)

There was no *Brady* violation in not disclosing certain wiretap pleadings, tapes and transcripts, where the Government turned over two of six boxes belonging to a Florida state prosecutor for review by the district court and presented evidence that the other four boxes were never sent to it by the

state authorities and that defendant was advised of the location of those boxes.

Michael K. Fagan, St. Louis, Mo., for appellant/cross-appellee.

James D. McMaster, Coral Gables, Fla., for appellee/cross-appellant.

Before ARNOLD and BEAM, Circuit Judges, and HENLEY, Senior Circuit Judge.

ARNOLD, Circuit Judge.

Jerry Lee Harvey was convicted of one count of conspiracy to impede the Internal Revenue Service's collection of income taxes. Harvey received a five-year prison sentence and a $10,000 fine, the maximum penalty for violation of 18 U.S.C. § 371. The United States sought a lengthier sentence under the dangerous-special-offender (DSO) sentencing provisions, 18 U.S.C. § 3575, but the District Court dismissed the government's DSO notice, and the government appeals. Harvey has filed a cross-appeal alleging numerous errors in his

trial, primarily the government's improper use of information obtained under a grant of immunity in connection with a 1980 agreement not to prosecute harvey for a drug offense. We find no errors warranting a new trial; however, the District Court did commit reversible error during the sentencing phase when it dismissed, without an evidentiary hearing, the government's Notice of Intent to Proceed Under the Dangerous Special Offender Statute. We remand for an evidentiary hearing to determine whether Harvey is a dangerous special offender in accordance with 18 U.S.C. § 3575.

I.

In December 1986 a federal grand jury indictment charged Harvey and Dennis Patrick McCartan[1] with conspiring to defraud the United States through a tax-evasion scheme involving the purchase of a Lear jet. Harvey's first conviction was reversed on account of improperly admitted evidence, and a new trial was ordered. *United States v. Harvey,* 845 F.2d 760

---

[1]McCartan later reached an agreement with the government and testified in these criminal proceedings against Harvey.

(8th Cir.1988). We now review a second conviction, obtained at the new trial on remand.

The government presented evidence that beginning in 1982 McCartan arranged several purchases of jet aircraft for Harvey. At Harvey's request, McCartan sought to include large amounts of cash in some of these purchases. One request to purchase an aircraft from the Vollrath Company for "125 thousand dollars in under-the-table money" became known to the FBI. Further negotiations between Vollrath, McCartan, and harvey were taped. Ultimately, a price of $140,000 was agreed upon, to include $60,000 in "unreportable" currency. The sale was consummated through an FBI undercover agent in January 1983. Ten months later, in November 1983, harvey asked McCartan to confirm the documented price with the seller-previously Harvey had suggested $80,000 or $85,000, "just in case somebody every checks." Harvey reported a purchase price of $80,000 on his corporation's income-tax return, leaving an outlay of $60,000 unaccounted for. In recorded phone conversations in 1985, Harvey confirmed that he and McCartan

had coordinated the $80,000 figure in reporting to the IRS.

In both trials Harvey claimed that the tax-conspiracy charge, the grand-jury proceedings, and certain evidence admitted against him violated a 1980 agreement with federal authorities in Mobile, Alabama. That agreement allegedly gave him "complete immunity" for all past misdeeds, including the use of off-shore accounts for proceeds from drug dealing. The District Court overruled Harvey's objections. It reasoned that any immunity granted in 1980 would be irrelevant to a conspiracy that began in 1982. The Court reviewed transcripts of the grand jury proceedings and found that no immunized information was presented to the grand jury.

Following the jury verdict in the first trial, the District Court unsealed the government's Notice of Intent to Proceed Under the Dangerous Special Offender Statute. 18 U.S.C. § 3575 provided[2] for an enhanced sentence of up to 25 years in certain circumstances. Section 3575(e)(2) defines a "special

---

[2]The statute has been repealed, but proceedings under it are saved by 1 U.S.C. § 109.

offender" as one who committed the felony for which he is sentenced "as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise...." Criminal conduct forms a "pattern" if it "embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

The District Court granted Harvey's motion to dismiss the notice on the ground that on its face it failed to establish a "pattern of conduct" as required by 18 U.S.C. § 3575(e)(2). The government was not allowed to present evidence in support of the statute's applicability, because the Court found the Notice insufficient as a matter of law. The Court ruled that allegations in the Notice that Harvey had previously engaged in drug trafficking and violent behavior were "quite different" from impeding the collection of taxes, and thus were more like "isolated events," specifically excluded by the statute from

forming a pattern of conduct. During Harvey's appeal of his first conviction, the government cross-appealed the dismissal of the Notice, but a panel of this Court reversed Harvey's conviction without reaching this issue. *Harvey,* 845 F.2d at 763. Following the second trial, the government renewed its request for a hearing in order to demonstrate the requisite pattern of conduct. This request was summarily denied. No specific ruling was made with respect to Harvey's claim that the Notice was based upon immunized information.

II.

We first address the government's claim that it should be allowed to present evidence that Harvey is a dangerous special offender. The dangerous-special-offender sentencing provisions require that the government file with the trial court a notice that it seeks application of the statute. The notice must "set[] out with particularity the reasons why [the prosecutor] believes the defendant to be a dangerous special offender." 18 U.S.C. § 3575(a). The notice requirement is a procedural protection for the defendant. See *United States v.*

Kelly, 384 F.Supp. 1394, 1400 (W.D.Mo.1974), *affirmed*, 519 F.2d 251 (8th Cir.1975).

In its memorandum and Order entered at the conclusion of the first trial, the District Court held that the Notice was sufficiently particular and not merely conclusory: "[T]he government listed numerous criminal activities defendant had allegedly engaged in including assisting in and threatening violence toward others, long-term large-scale drug trafficking, [and] violation of probation and parole.... Although the notice lacks specific dates, locations, and names of victims, in light of the pretrial detention hearings at which specific details were brought out, the Court finds that the notice in this case does satisfy the requirements of particularity contemplated by the statute."[3]

---

[3]The notice alleges that Harvey possesses (a) unusual knowledge, judgment or ability in the buying, brokering and/or selling of aircraft and/or of real estate, in the use of corporations to mask personal financial dealings and holdings, in tax evasion and commission of Internal Revenue Code violations, in money laundering, in illegal drug trafficking, in furthering fraudulent schemes by the use of mail and/or wire communication facilities, in witness intimidation and murder,

[1,2] The Court nevertheless dismissed the Notice because it did not allege a sufficient "pattern of conduct." The Court held that "pattern of conduct" requires a common element-something more specific than the purpose of "amassing wealth" suggested by the government during the argument on Harvey's motion to strike the Notice. The government claims it did not assert that amassing wealth was the *only* purpose connecting the charged conspiracy with the conduct alleged in the Notice; furthermore, the Notice need only allege that a pattern exists, not actually establish proof of that pattern. The government claims it should get an opportunity to show that these seemingly unrelated acts are in fact related.

We agree. The statute says that criminal conduct forms a pattern :if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of

---

and in defrauding governmental agencies; and (b) facilitating the initiation, organizing, planning, financing, directing, management, supervision, execution or concealment of such criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits and proceeds of such conduct.

commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). If, for example, the government can show that a substantial amount of the cash involved in the instant tax offense came from prior drug dealings, the conspiracy involving the lear jet would not be an isolated event, and a sufficient pattern would be established. (The Notice can be read to allege that Harvey wanted to conceal income from the I.R.S. because that income was the fruit of previous crimes.) The government should be allowed an opportunity to show some interrelation between the criminal acts alleged in the Notice and the tax-conspiracy charge. We therefore remand for an evidentiary hearing to determine if enhancement of Harvey's sentence according to 18 U.S.C. § 3575 is appropriate.

[3] We note that on remand the government may not introduce evidence obtained in violation of an immunity agreement with Harvey. The government neither wrote down the terms of the agreement at issue, nor recorded the information Harvey allegedly provided. However, a district

court in Florida has found that Harvey was given both use and transactional immunity in an informal agreement with the government in 1980. *United States v. Harvey,* 651 F.Supp. 894 (S.D.Fla.1986). This finding was not challenged by the government on appeal. A panel of the Eleventh Circuit affirmed. *United States v. Harvey,* 848 F.32d 1547 (1988). Upon rehearing *en banc,* the Eleventh Circuit reversed in part the District Court, but the finding of immunity was upheld: "Harvey received transactional and use immunity for any testimony as to which he could have invoked his fifth amendment privilege in September of 1980." *United States v. Harvey,* 869 F.2d 1439, 1446 (1989) (*en banc*). Accordingly, collateral estoppel applies-the government may not relitigate the existence of this agreement in any other proceeding against Harvey.

Harvey's immunity is not a formal grant of immunity, see 18 U.S.C. § 6001 *et seq.,* and so the limits of this immunity are not defined by statute. Rather, it is in the nature of a contract, the terms of which govern the extent of immunity

appropriate here. The 11th Circuit confirmed harvey's claim that he received "complete immunity."[4] We take this to mean, as did the Eleventh Circuit, that the government offered Harvey "complete immunity" in the generally understood, formal use of the term: Harvey received both transactional and use immunity.

As developed in the context of formal grants of immunity, transactional immunity accords full protection from prosecution for the offense to which the immunized testimony relates. Use immunity is more limited: it prohibits the use, in a criminal prosecution, of any evidence derived directly or indirectly from the information provided to the government. The burden is on the government to demonstrate a source independent of the immunized testimony. The required showing is stringent. See, *e.g.*, *United States v. Poindexter*, 727

---

[4]Harvey testified that the government "agreed nothing I ever give [sic] them would be used against me, nor would any U.S. Attorney's Office seek to prosecute me for anything; that I was just getting a clean walk, and I should stay on the Government's side and help them." quoted in *United States v. Harvey*, 869 F.2d at 1453 (dissenting opinion).

F.Supp. 1488 (D.D.C.1989).

[4] Only use immunity is at issue here. Transactional immunity prohibits prosecution of immunized acts-the hearing under the dangerous special offender provision is to determine sentence. Harvey's use immunity, however, may prevent the government from introducing evidence at the sentencing hearing of certain acts alleged in the Notice. If Harvey claims that an offer of evidence relating to a pre-1980 act violates his use immunity, then the government may introduce that evidence to enhance his sentence only if it proves that it was "derived from a legitimate source wholly independent" of the testimony given under the grant of immunity. *Harvey*, 869 F.2d at 1444-45. See *Kastigar v. United States*, 406 U.S. 441, 461-62, 92 S.Ct. 1653, 1665, 32 L.Ed.2d 212 (1972).

[5] We reject Harvey's several alternative arguments supporting the trial court's dismissal of the government's Notice. 18 U.S.C. § 3575(a) requires that the government not disclose to the trial court, prior to conviction, that it is seeking

an enhanced sentence.[5] According to Harvey, the Notice should be dismissed because the same judge presided at both of his trials, and therefore knew of the government's intent to seek an enhanced sentence at his second trial. The non-disclosure provision does not mean, however, that a judge cannot anticipate a filing, or be aware that a notice was filed at a trial subsequently reversed on appeal. *United States v. White,* 748 F.2d 257 (5th Cir.1984). The trial judge below dismissed the government's Notice after Harvey's first conviction. The government did not refile its Notice during the second trial; it merely renewed its request for reconsideration *after* Harvey's second conviction. Harvey has thus shown no prejudice from this procedure. An appropriate remedy might have been a motion to disqualify the trial judge from presiding at the second trial, see *United States v. Ouimette,* 614 F.Supp. '107

---

[5]18 U.S.C. § 3575(a) provides: In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any please of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties.

(D.R.I.1985), but Harvey did not raise this objection below and therefore cannot raise it now.

[6] Equally meritless are Harvey's claims that the Notice is insufficiently particular, and that the dangerous-special-offender statute is unconstitutional because its terms are vague. The District Court's rulings on these objections were not erroneous. Harvey also claims that the statute allows use of hearsay evidence and fails to protect his rights under the Confrontation Clause. These arguments are premature. They can be raised and decided, if necessary, during the evidentiary hearing on remand.

III.

Harvey's cross-appeal alleges that several errors occurred during the conviction phase of his second trial, requiring reversal and a new trial. These errors include violations of the immunity agreement, improper introduction of "other crimes" evidence, and withholding of exculpatory evidence by the government.

Harvey contends that his "complete immunity"

agreement was violated numerous times by the prosecutor's references to "offshore cash." According to Harvey, these references insinuated that the aircraft transaction was but a small part of an ongoing attempt to launder drug profits which the government had discovered in the Cayman Islands. Harvey claims the government did not discover the existence of these funds; rather, his own immunized testimony in 1980 was the source of the government's information.

[7] We follow the reasoning of the eleventh Circuit *en banc* opinion to hold that any transactional immunity Harvey received in 1980 is irrelevant to a prosecution for a tax conspiracy that began in 1982. *Harvey*, 869 F.2d at 1445-48. Nor was there a violation of Harvey's use immunity by references to "offshore cash" in the prosecutor's closing statements. Though the district Court made no explicit finding on the point, the government showed sources independent of any information Harvey may have revealed to drug agents in 1980. Two witnesses, McCartan and Irene Hudak, who prepared Harvey's income-tax forms in 1983, testified that

Harvey told them of an account he held in the Cayman Islands.

Harvey also claims that the prosecutor was improperly exposed to immunized information, and that evidence of pre-1980 drug dealing was presented to the grand jury in violation of his immunity agreement. The District Court considered harvey's proffered evidence and reviewed the grand-jury testimony *in camera*. We cannot say that the District Court's findings were clearly erroneous. Harvey asserts another immunity violation occurred at his pretrial-detention hearing, at which he was required to prove that the government had violated the immunity agreement-an improper burden of proof. We do not consider this claim because, even if correct, it would not require reversal of his conviction.

[8] Harvey further contends that the District Court erroneously allowed evidence of high prejudicial "bad acts" to be presented to the jury, in violation of Fed.R.Evid. 403 and 404. This Court reversed Harvey's first conviction on account of references to Harvey's alleged drug dealing. *Harvey*, 845 F.2d 760. During the second trial, the District Court was

particularly solicitous of Harvey's objections on this ground. The government was allowed to present evidence of offshore funds, minor discrepancies in other tax statements, numerous and large cash transactions, and Harvey's use of nominee corporations and two social-security numbers. We hold that this evidence was not unduly prejudicial, and is relevant to the crime charged-a tax-evasion conspiracy. Nothing explicit was said to connect this evidence with drug dealings.

[9] Harvey's last assertion of error involves an alleged violation of *Brady v. Maryland*, 737 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Harvey claims the government did not disclose certain wiretap pleadings, tapes, and transcripts that "may contain" exculpatory conversations with Vollrath officials. The government turned over two of six boxes belonging to a Florida state prosecutor for review by the District Court. The government presented evidence that the other four boxes were never sent to it by state authorities in Florida, and that Harvey was advised of the location of those boxes. The District Court's findings are not clearly erroneous, and we agree that these facts

are insufficient to constitute a *Brady* violation.

In conclusion, Harvey is not entitled to a new trial. However, because the District Court erroneously dismissed the government's Notice of Intent to Proceed Under the Dangerous Special Offender Statute, we reverse and remand for a hearing to determine whether enhancement of Harvey's sentence under 18 U.S.C. § 3575 is appropriate.

It is so ordered.

WEST KEY NUMBER SYSTEM

UNITED STATES of America, Appellant.

UNITED STATES of America

Appellant,

v.

Jerry Lee HARVEY, Appellee.

Nos. 87-1877, 87-1878.

United States Court of Appeals,

Eighth Circuit.

Submitted March 17, 1988.

Decided April 26, 1988.

Emergency Motion for Release

and Rehearing Denied

June 24, 1988.

Defendant was convicted in the United States District Court for the Eastern District of Missouri, Edward J. Filippine, J., of conspiracy to defraud United States. Defendant appealed. The Court of Appeals, Fagg, Circuit Judge, held that erroneous

admission of evidence about defendant's prior, uncharged drug and financial dealings required reversal.

Reversed and remanded.

1. Criminal Law ## 374

Rather than making broad reference which merely restates components of rule for admission of prior bad acts, district court should specify which components of rule form basis of ruling and why. Fed. Rules Evid.Rule 404(b), 28 U.S.C.A.

2. Criminal Law ## 374

Court should require party invoking rule for admission of prior bad acts to explain its analysis under rule. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

3. Criminal Law ## 1169.11

Erroneous admission of evidence about defendant's prior, uncharged drug and financial dealings required reversal in prosecution for conspiracy to defraud the United States; evidence concerned dissimilar conduct that occurred over ten years earlier; and district court gave no limiting instruction. 18

U.S.C.A. § 371; Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

4. Criminal Law ## 371(12)

Danger of unfair prejudice as result of admission of defendant's prior drug and financial dealings outweighed probative value to show defendant's motive for his structuring cash component of sale that was part of alleged conspiracy to defraud United States; evidence concerned dissimilar conduct that had occurred over ten years earlier. 18 U.S.C.A. § 371; Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

James D. McMaster, Miami, Fla., for appellant.

Samuel Rosenthal, Washington, D.C., for appellee.

Before FAGG and MAGILL, Circuit Judges, and WRIGHT,[1] Senior Circuit Judge.

FAGG, Circuit Judge.

Jerry Lee Harvey was convicted in 1987 of conspiring to defraud the United States in violation of 18 U.S.C. § 371.

---

[1]The HONORABLE EUGENE A. WRIGHT, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

Harvey's conviction arose of his participation in a scheme to avoid payment of appropriate federal taxes related to the sale of an airplane. Harvey appeals, claiming the district court improperly admitted evidence of Harvey's involvement over ten years earlier in other criminal activities. We reverse and remand for a new trial.

Harvey arranged through Patrick McCarten, an airplane broker in St. Louis, Missouri, to buy a Lear jet. The terms of the sale called for Harvey to pay a cash deposit and to pay the remainder of the purchase price in two parts: one part in the form of a check or wire funds transfer and the other in cash on delivery. The understood function of this method of payment was to misrepresent the actual sales price of the airplane for the purpose of avoiding payment of federal taxes attributable to the transaction.

As part of its case in chief of Harvey's tax conspiracy prosecution, the government offered the following testimony by McCarten concerning a meeting he had with harvey during an unrelated business trip:

Q. Did you talk about various subjects during the lunch?

A. Yes, sir.

* * * * * * * * *

Q. What did the defendant say?

A. The defendant indicated to me that at some time in his past, that I interpreted to be the late '60s and the early '70s, that he was an importer of drugs into the United States.

Q. Did he say whether or not he made any money in his business dealings?

A. Yes, sir, he indicated that he made large sums of money.

Q. Did he say anything about how large?

A. The term millions comes to mind.

Q. Did he say where the money was?

A. Yes, sir, he indicated the money was invested in the Cayman Islands.

* * * * * * * * *

Q. Did he tell you why he had gotten out of the business?

A. He indicated to me that some time in the mid to late '70s, he had contracted cancer of the ankle and it was going to take considerable time to rehabilitate himself from the operation curing the cancer. He felt he could no longer operate the business of importing drugs in-being less than 100 percent capable, and therefore he had dismantled his business and ceased to operate in that area.

Tr. 3-43 to 3-45.

Harvey raised the issue of the admissibility of this evidence in his pretrial and post-trial motions. At trial, Harvey objected to McCarten's testimony as irrelevant and even if relevant, as highly prejudicial under Federal Rule of Evidence 403. In response, the government stated its purpose for offering the evidence was to show Harvey's conduct was not the result of mistake or accident, but was motivated by harvey's

need for a method of converting earlier illegal gains into legitimate assets by passing extra cash "under the table."

The district court overruled Harvey's objection to McCarten's testimony, determining that under rule 403 the evidence was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. The district court also ruied that under Federal Rule of Evidence 404(b) the evidence was admissible to show motive, intent, preparation, or absence of mistake or accident. The jury was not instructed, either at the time of McCarten's testimony or in the final instructions, that the evidence could be considered only for this limited purpose and not as evidence of Harvey's propensity to engage in criminal activity.

[1,2] Initially, we observe the district court's "laundry list" approach to rule 404(b) is of little help to us. Rather than making a broad reference which merely restates the components of the rule, the district court should specify which components of the rule form the basis of its ruling and why. *See United States v. Rivera,* 837 F.2d 906, 912 (10th Cir.1988).

To that end, the court should require the party invoking the rule to explain clearly its 404(b) analysis. *See id.*

[3] On appeal Harvey does not challenge the sufficiency of evidence to support his tax conspiracy conviction. Neither does he challenge the accuracy of McCarten's description of his earlier activities. Instead, Harvey argues that because McCarten's testimony concerns uncharged drug and financial activities occurring more than ten years before this tax prosecution, the district court committed reversible error in allowing the jury to consider that evidence. We agree.

[4] McCarten's testimony about Harvey's past drug and financial dealings is evidence of other bad acts and is not admissible to prove that because Harvey engaged in illegal conduct in the past, he is guilty of the current charge. *See* Fed.R.Evid. 404(b); *United States v. Lanier,* 838 F.2d 281, 285 (8th Cir.1988) (per curiam). The government contends the evidence is admissible, however, for the purpose of proving motive. *See* Red.R.Evid. 404(b); *United States v. Wagoner,* 713 F.2d 1371, 1375 (8th Cir.1983). Rule 404(b) admissibility

requires:

> (1) An issue is raised on which evidence of other crimes may be received; (2) the evidence is relevant to that issue; (3) the evidence of the other crime or bad act is clear and convincing; and (4) the probative worth outweighs any prejudicial impact.

Lanier, 838 F.2d at 285. Although the district court has broad discretion in deciding whether to admit evidence of this type, *see id.*, we cannot agree McCarten's testimony meets the requirements for readmission under rule 404(b).

Even if we accept the government's argument the disputed evidence is relevant on the issue of harvey's motive for structuring the cash component of the sale and that McCarten's testimony was clear and convincing, the evidence does not meet *Lanier's* fourth requirement. This requirement recognizes that evidence admissible under rule 404(b) is still subject to the constraints of Federal Rule of Evidence 403, *see United States v. Gustafson*, 728 F.2d 1078, 1083 (8th Cir.), *cert. denied*, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984), which requires

exclusion of relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice, *see* Fed.R.Evid. 403.

McCarten's testimony concerns Harvey's uncharged drug activities and related monetary gains during the "'60s and '70s." Harvey is charged with a tax conspiracy that is not claimed by the government to have begun until 1982 or to be directly related to Harvey's earlier actions. The testimony describes conduct by Harvey over ten years earlier that is both dissimilar and remote from the charged offense.

In the context of this case McCarten's testimony, even if probative of Harvey's motive, is highly prejudicial and could have been offered in reality only to prove Harvey has a criminal past. To compound the problem, the jury was not instructed on the limited purposes for which the evidence could be considered. *See Rivera,* 837 F.2d at 913. We believe admission of this evidence was contrary to rules (404(b) and 403, is not harmless error, and requires reversal. *See United States v. Schwartz,* 790 F.2d 1059, 1062 (3d Cir.1986) (per curiam).

It is regrettable the district court was ever put to the task of evaluating this testimony in light of the government's other undisputed evidence against Harvey. Federal prosecutors have a responsibility zealously to prosecute on behalf of the United States; unfortunately, this case demonstrates an instance in which the government's attorneys have allowed their "'zeal to our run [their] discretion.'" *See United States v. Pierce,* 792 F.2d 740, 742 (8th Cir.1986) (quoted citations omitted).

Because of our holding on the evidence issue, we do not consider the merits of Harvey's other contentions on appeal or the government's cross-appeal.

Reversed and remanded.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-1124/25EM

United State of America,	*	
	*	
	*	
Appellant/Cross-Appellee,	*	Appeal from the United States District Court for the Eastern District of Missouri
	*	
vs.	*	
	*	
Jerry Lee Harvey,	*	
	*	
Appellee/Cross-Appellant.	*	
	*	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

May 17, 1990

Order entered at the direction of the Court

Signature

Clerk, U.S. Court of Appeals, Eighth Circuit.